Limits to the Adversary System: Interests that Outweigh Confidentiality*

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I well recall the appointment of Justice Black to the United States Supreme Court. President Roosevelt had spent the four years of his first term frustrated at his inability to appoint a justice to the Court, a Court with a consistent record of nullifying New Deal measures. The “mandate” of Mr. Roosevelt’s second term landslide and the ensuing ill-fated court packing proposal are history. In 1937 a vacancy materialized with the resignation of Justice Van Devanter.

I was a second-year law student when the name of Senator Hugo LaFayette Black was sent to the Senate as Mr. Roosevelt’s first appointee. My reaction can only be described as one of deep shock. Senator Black in no way fitted my youthful blueprint of a Supreme Court Justice, and the ensuing confirmation difficulties afforded me little comfort. Time was to prove me wrong and today Justice Black stands as one of my judicial heroes. It is a high honor to be asked to deliver the Hugo L. Black Lecture.

Particularly appropriate to this lecture is a discussion of the adversary system of justice and the role of the lawyer in that system. Justice Black emphasized in many opinions the rights of the criminally accused. In the landmark case of Gideon v. Wainwright,1 he stressed the constitutional necessity of competent lawyers under our system in order to safeguard those rights.

The site of this lecture in the State of Alabama is also a happy coincidence. The first Code of Professional Ethics in the United States was that formulated and adopted by the Alabama State Bar Association almost one hundred years ago in 1887.2 This Code served as a model for codes adopted in many other states as well as for the Canons of Ethics promulgated by the American Bar Associ-

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2. See H. DRINKER, LEGAL ETHICS 352-63 (1953).
ination shortly after the turn of the century. Many of the provisions of the present Code of Professional Responsibility have their counterparts in the Alabama Code.

The 1980’s bring with them demands upon the legal profession unprecedented in our history. Ever increasing complications in government, international relations, and the world of business insure an escalating demand for lawyer services concomitant with a sharp increase in the number of law school graduates. This increase in lawyer demand and supply comes at a time when public criticism of lawyers and their profession is also at an all-time high. Inured as lawyers may have become to criticism, they must be mindful that as members of a monopoly profession that prides itself on self-regulation they will be subject to incessant demands for increased professional competence and ethical behavior by the consumers of legal services.

The past decade has seen many studies of ethics, ethics in government, in business and in the professions generally. Perhaps no one of the professions has been more subject to public scrutiny than the law, both within and outside its membership. Sensitive to this public interest and criticism and mindful of the dramatic changes that have taken place in society and in the profession since the adoption of the present Model Code of Professional Responsibility in 1969, the American Bar Association this past month completed a Discussion Draft of Proposed Model Rules of Professional Conduct. These Rules are the product of a Special Commission, composed of judges, practicing lawyers, academicians and government counsel, which has been at work on the project for the past three years. It has been my pleasure to serve as a member of that Commission and I will refer this evening to some of the proposed Rules as well as to provisions of the present Code.

The Adversary System

Central to any formulation of an ethical code for lawyers must

3. Id. at 23-26.
5. Hereinafter referred to in text as the CODE. Disciplinary Rules will be referred to as DR, and Ethical Considerations as EC.
6. Hereinafter referred to as the RULES. The Draft has not yet been submitted to the American Bar Association House of Delegates and does not constitute A.B.A. policy.
be the realization that although the adversary system is basic to the practice of law in this country it must constantly be reexamined and defined in the light of today’s world. It is my purpose, first of all, to attempt a definition of the adversary system, and secondly, to discuss a few of the limits that appear necessary if the legal profession is to convince society that it is indeed a profession of service, competence and high ethical standards with a continuing right to self regulation.\(^7\)

In explaining to a layman the professional responsibilities of a lawyer one encounters almost immediately the enigma of the adversary system, often referred to as the “sporting” or “contest” system. How can you defend a person you know is guilty? How can you justify one-sided presentation if truth is the goal? Is not the search for truth subordinated to winning the law suit? Is it not the duty of an attorney to do everything possible to further the client’s cause? Is the lawyer merely a hired gun, a mouthpiece, a hired brain and voice? Is the system anything other than a modern reflection of man’s inherent combative nature, a pageant necessitating professional apology? One law student put this discerning question: “Is not a lawyer merely his client with a law degree; should not the lawyer do what the client would do, if the client had the learning and abilities of a lawyer?”

Frequent attempts have been made to reply to these and similar criticisms. The adversary system has been described as the best guaranty against premature and biased decisions, a guaranty that would be absent if a judge were forced to make his own investigation and decide a dispute without partisan advocacy.\(^8\) To insure objectivity, the judge is asked to come to the trial uncommitted and the advocates to come committed and fully prepared, each advocate to present as effectively as possible one side of the controversy.\(^9\) The advocate must not rely on the preparation of his case

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\(^7\) The introduction to Rule 10 of the Rules, “Maintaining the Integrity of the Profession,” sets forth the special responsibilities of professional self-government.


\(^9\) The Rules compare this role with the responsibility of an advocate in an ex parte proceeding (Rule 3.5) and in a controversy against an unrepresented party (Rule 3.6).
by either the judge or opposing counsel. In explaining the system, frequent stress is also placed on the thesis that truth is best achieved by this process, the impartial arbiter educated by competent opposing counsel, each with an eye to the best interests of a client.

The system, at its best, presupposes that counsel are competent, diligent, loyal, honest and fair, hopefully equally so. Only with these attributes will judge and jury and the public generally have the requisite confidence in the members of a profession possessing the important monopoly of representation in our justice system. My remarks will focus primarily on lawyer loyalty and honesty but the criteria of competence, diligence and fairness deserve equal billing in any description of the adversary system.

The proposed Rules of Professional Conduct begin with the mandates to act competently, to attend promptly to the client's cause, to communicate adequately with the client, and to be diligent in the representation. These basic affirmative duties are at the heart of the system and any practices that undermine their achievement are prima facie suspect.

More controversial and more troublesome provisions of all lawyer code of ethics are those pertaining to the dual requirements under the heading of Loyalty to Client. These are the rule of confidentiality and the necessity for independent, professional judgment, unimpaired by conflicting interests.

Few will disagree with the proposition that full disclosure from client to counsel is important to the proper functioning of the adversary system. Effective representation is dependent upon counsel's knowing everything possible about the case and frequently this information can be obtained only from the client. An accompanying assumption tells us that the inducement to communicate

10. The requirement of fairness to the opposing party and counsel (Rule 3.2) and of respect for the interests of third persons, including witnesses, jurors, and others incidentally connected with a proceeding (Rule 3.4) are not dealt with in this paper although such requirements obviously set limits to the adversary system.
12. Rule 1.2.
14. Rule 1.5.
15. Rule 1.7; ABA, Code of Professional Responsibility [hereinafter cited as the ABA Code], Canon 4.
16. Rules 1.8, 2.1, 3.9; ABA Code, Canon 5.
may be reduced if the client is not convinced that confidences will be honored by a lawyer whose representation is unimpaired by conflicting interests. The client, uncertain of the attorney's competence and diligence, may also be restrained in the divulging of confidences, but the primary assumption with reference to possible withholding of information centers on violation of the rule of confidentiality. Are clients aware of this rule and does it influence free communication?

The extent to which clients would be deterred from consulting lawyers, or would withhold information, if exceptions to the confidentiality rule were expanded has not been tested empirically and one can only speculate as to the scope of deterrence that might result. It can be argued that in-as-much as lawyers are an indispensable part of our justice system they would be employed even without the rule. It is to the best interests of most clients to talk freely to their attorneys and it is not clear that this communication would dry up if additional exceptions to a basic rule of confidentiality were made, all in the interest of safeguarding other important societal values.

In order, however, to weigh the importance of these other values it will be assumed that clients are familiar with the confidentiality rule and that encouragement to speak fully is proportionate to the strength of this rule. At what point do the other societal interests outweigh the desirability of full disclosure? It is clear that the preservation of client confidences is not an absolute in the adversary system of justice. Countervailing duties have long been recognized and must, at times, offset any absolutist claims. It is my intention to highlight a few of the competing duties that have recently emerged. It is these duties that the profession must balance against duties owed to clients and it is not clear that yesterday's balance will afford the answer to tomorrow's reconciliation.

**Illegal or Unjust Conduct**

An itemization of the so-called in-roads upon the duties owed to clients might begin with the non-debatable assertion that the lawyer may not himself participate in a violation of the law, including the Code of Professional Responsibility, however helpful such violation might be to the client's cause. Loyalty to client

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17. See Rules 1.3(b), 1.4(b), 1.5(a), 1.16(a)(1), 2.3, 2.4, 2.5; ABA Code, DR 2-110(C), DR 7-102 (A) (2), (7), (8).
The proposed Rules further provide that upon adequate disclosure to the client the lawyer may withdraw if the client persists in a course of conduct that is illegal or unjust. The present Code limits the right to withdraw from an unjust, but legal, case to the situation where the client insists that the lawyer engage in conduct contrary to his best judgment in a matter not pending before a tribunal.

The lawyer is not his client with a law degree nor is he a hired gun. He can instead endeavor to prod the conscience of the client, can consider fairness to others, and can refuse to assist in a cause considered to be unjust. It is difficult to conclude that our justice system is not bettered by an option of this nature.

**Former Clients and Vicarious Disqualification**

A lawyer who has represented a client may not thereafter represent a second client in the same or related matter if the interests of the two clients are adverse. Neither may the lawyer use information acquired in the earlier representation in a manner disadvantageous to the first client. Although these rules, bearing on loyalty to the first client, are fairly obvious under the adversary system, related and difficult problems of vicarious disqualification have arisen increasingly with the rapid growth of law firms and the present day movement of lawyers between them.

Subsequent to termination of an association, to what extent does the principle of loyalty to a client forbid representation of a later client by the remaining lawyers, by the departing lawyer, and by any lawyer with whom the departing lawyer later associates? An extreme interpretation of the adversary theory would agree with the present Code which contains a brief, simplistic Disciplinary Rule—"If a lawyer is required to decline employment or to withdraw from employment under a Disciplinary Rule, no partner, or associate, or any other lawyer associated with him or his firm, may

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18. **Rule 1.16(b)(2).** Although withdrawing presents more difficulties than refusing to accept an unjust case, **Rule 1.15(a)** states that "a lawyer's representation of a client, whether by retainer or by appointment, does not constitute an endorsement of the client's political, economic, social, or moral views or activities."

19. **ABA Code, DR 2-110(C)(1)(e).**

20. **Rule 1.10(a)(1), (2).**
accept or continue such employment." 21 This carries the principle of loyalty to client to extreme lengths. The present Code seems based on the naive assumption that all confidences known to lawyers in the first firm are known to all lawyers in the second firm and thus a per se rule of disqualification is necessary. The additional argument of avoiding appearances of impropriety is also sometimes advanced.

The new Rules are more realistic, but at the same time more elaborate. 22 They recognize that the former client needs protection under the principle of loyalty but that any rule of disqualification should not unduly preclude later clients from having free choice of legal counsel or unreasonably hamper formation of new associations. These, too, are important considerations in our justice system.

The new Rules look to two basic objectives: preservation of client confidences and the avoidance of positions adverse to the former client. They seek to achieve those objectives, balanced by the interests of later clients and free professional association, by recognizing that there is a great range of relationships where a lawyer may have access to much, to some, to little, or to no confidential information. Disqualification must be correspondingly adjusted as a factual matter.

With reference to the second objective, avoidance of adverse positions, there is the recognition that the question becomes one of determining the significance of the lawyer's participation in the representation of both the first and the second client where their interests are materially adverse. Only in the case of significant participation would the rule of vicarious disqualification obtain. The proposed Rules, even if known to clients, would not appear to discourage desirable communication by the first client.

Client Wrongdoing

Universally recognized as an exception to the law of evidentiary privilege is the distinction between a client's statements concerning past crimes and an expressed intention with reference to future illegal acts. Only the former receive the protection of the privilege.

The present Code states that a lawyer may reveal confidential

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21. ABA Code, DR 5-105(D).
22. See Rule 7.1, 1.11(e) (government lawyer conflict of interest).
communications from a client with reference to "the intention of his client to commit a crime and the information necessary to prevent the crime."\textsuperscript{23} The new Rules go beyond this and require disclosure of confidence if "necessary to prevent the client from committing an act that would result in death or serious bodily harm to another person."\textsuperscript{24} In the case of some lesser deliberate wrong the lawyer has professional discretion to make the disclosure.\textsuperscript{25}

These exceptions to the rule of confidentiality emerge when the serious interests of the client's potential victim are weighed against the possible discouragement of disclosures that may result when client expectations as to confidentiality are defeated. Most jurisdictions have found the former interests preponderating. In order to minimize reduction of disclosures to the attorney, adequate explanation of this limiting rule should be made to the client at the appropriate time. No client should be privileged in discussing future wrongdoing with a lawyer, despite the argument sometimes advanced that such discussion can make possible lawyer attempts to dissuade from improper conduct.

\textit{Corporate Counsel}

In turning from representation of individuals to that of corporate counsel the problems of lawyer obligations in the light of client wrongdoing become much more complicated. There is no disagreement with the proposition that "a lawyer employed or retained by a corporation or similar entity owes his allegiance to the entity and not to a stockholder, director, officer, employee, representative, or other person connected with the entity."\textsuperscript{26} Uncertainty arises by virtue of the fact that corporate counsel must, of necessity, deal with individuals who personify the corporation and at various times deal with one or more of the individuals mentioned above as representatives of the corporation. What is the responsibility of the corporate lawyer when the official or employee, from whom the lawyer may have received confidential information,

\textsuperscript{23} ABA CODE, DR 4-101(C)(3)
\textsuperscript{24} RULE 1.7(b).
\textsuperscript{25} RULE 1.7(c)(2). RULE 3.11(a) states that a lawyer shall not "agree to represent a person proposing to commit a crime, except as part of a good faith effort to determine the validity, scope, meaning, or application of the law."
\textsuperscript{26} ABA Code, EC 5-18. The Code stops with this Ethical Consideration and does not attempt to give additional guidance for the corporate lawyer.
elects to pursue a course of action that may be illegal? The new Rules require the lawyer to “go over the head” of the corporate employee where the law would be violated and would likely result in significant harm to the corporation. Eventually the lawyer may have to go to the board of directors, perhaps to the “outside” members of the board. The Rule further provides that “the lawyer may take further remedial action, including disclosure of client confidences to the extent necessary, if the lawyer reasonably believes such action to be in the best interest of the organization.” Rule 1.7(c)(2) also permits a corporate lawyer, as it does any lawyer, to disclose confidential information where a client’s deliberately wrongful act may injure a third person.

Lawyer Truth Telling

Many provisions of the present Code and of the proposed Rules emphasize the duty of the lawyer not to misrepresent, even though advantage to the client, at least short range, thereby suffers. These provisions reflect the basic necessity for truth telling by members of the legal profession and imply the consequences that would follow if lawyers could not be relied upon to tell the truth.

The Code states flatly that a lawyer in his representation of a client “shall not knowingly make a false statement of law or fact,” or “participate in the creation or preservation of evidence when he knows, or it is obvious, that the evidence is false.” The proposed Rules mandate candor toward the tribunal and state that the lawyer shall not “make a knowing misrepresentation of fact,” or “a representation about existing legal authority that the lawyer knows to be inaccurate or so incomplete as to be substantially misleading.” In many instances scienter would be present.

28. RULE 1.13.
29. RULE 1.13(c).
30. ABA CODE, DR 7-102(A)(5).
31. ABA CODE, DR 7-102(A)(6).
32. RULE 3.1.
33. RULE 3.1(a)(2).
34. RULE 3.1(a)(4). The RULES also provide: “a lawyer shall not make any false, fraudulent, or misleading statement about the lawyer or the lawyer’s services to a client or prospective client.” (RULE 9.1). “a lawyer in connection with a
solely as the result of a confidential communication from the client, yet the rules forbidding misrepresentation by the attorney are unequivocal.

The theory sometimes advanced, that the adversary system excuses, and indeed, compels misrepresentation, is productive of much of the public censure of lawyers. It is a philosophy that has a deleterious effect on lawyers themselves, on the profession, and on the justice system. The adversary system is only part of a larger society which frowns on deception. Public criticism of the legal profession is most strident when there is belief that truth telling is not uppermost in the lawyer's code of ethics. Both the Code and the proposed Rules emphasize the duty not to misrepresent.

Perjury by the client is a special kind of falsehood as well as a crime committed or about to be committed, undermining the major objective of the adversary system. Ascertainment of truth, the proclaimed objective of the system, and perjury, or the subornation thereof, are at complete odds. Here, however, a major conflict often surfaces between the lawyer's duty to maintain the client's confidences and the duty of candor to the court. What is the lawyer's professional responsibility when he is privy to information, received from the client, that there is, or is likely to be, client perjury or fraud?

The present Code, after much backing and filling, requires disclosure of fraud "except when information is protected as a privileged communication." This constitutes a large exception.

The drafters of the new Rules had little difficulty in requiring disclosure of the client's deception to the court or to the other party in a civil action despite the fact that this can have serious
consequences to the client and may well be looked upon as a disloyal violation of the rule of confidential communications. The duty of loyalty ends when a lawyer is called upon to assist in deceiving the court.

Whether an advocate for a criminally accused has the same responsibility has been frequently debated. All are agreed that the lawyer should seek to persuade the client to refrain from perjury, but where persuasion fails, what must the lawyer do? One view permits the advocate to say nothing about the perjury after presenting the accused as a witness, especially where knowledge of the perjury comes from the client. The lawyer thereby participates in the deception. A second solution is to permit the accused to testify by a narrative without any lawyer questioning or later reference to the testimony. This device appears highly artificial and confusing.

The new Rules take the position that in both civil and criminal cases the lawyer must reveal the client’s perjury. An accused has a constitutional right to the assistance of counsel, a right to testify on his own behalf, a right to refuse to testify, and a privilege of confidential communication with counsel. He does not have a constitutional right to commit perjury. Counsel, on the other hand, has a legal as well as an ethical duty not to assist in the commission of perjury. Only mandatory disclosure of perjury can satisfy these obligations.

vinced beyond a reasonable doubt is false. . . .” Rule 3.1(b) provides that if the “lawyer discovers that evidence or testimony presented by the lawyer is false, the lawyer shall disclose that fact and take suitable measures to rectify the consequences, even if doing so requires disclosure of a confidence of the client or disclosure that the client is implicated in the falsification.”

The major argument against such disclosure lies in the claim that defendants will be discouraged from free communication if they have no assurance that the confidences will be honored. Empirical proof of these claims is difficult as is proof that a strict rule of confidentiality invariably impels clients to tell the whole truth to their attorneys. A client can always decide that lying to his attorney is the best policy and can further determine that perjury on the witness stand is equally so, the risk of a criminal charge of perjury being minimal. The latter gamble is the client’s but he cannot be in a position to involve his attorney in the illegal testimony.

A lawyer’s professional responsibility should include advance warning to clients that lawyers cannot lie and cannot suborn perjury. Although this may reduce the information passing from client to attorney that is a small price to pay for the reputation thereby gained, both within and outside the profession, that lawyers do honor their obligation of candor to the court and to the judicial process. The attorney knowing he is a participant in client perjury does more harm to himself and to attorney-client relations than the harm envisioned to the adversary system that might result from complete honesty in representation.

Mandatory Factual Disclosure

An argument can be made that knowing misrepresentation or lying by a lawyer is little different from silence when the lawyer remaining silent knows of facts that would be determinative of a controversy and the facts are adverse to his client’s position. These facts may have been learned from the client or from other sources. The Code imposes an affirmative obligation upon a public prosecutor to make a timely disclosure to the defendant in criminal litigation of the existence of evidence, known to the prosecutor, that “tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.” The new Rules contain a similar provision. No comparable duty is imposed upon defense counsel in a criminal case or upon either counsel in civil litigation except insofar as the laws of discovery operate to require disclosure.

43. ABA Code, DR 7-103(B).
44. Rule 1.4(b) states: “A lawyer shall advise a client of the relevant legal and ethical limitations to which the lawyer is subject if the lawyer has reason to believe that the client may expect assistance not permitted by law or the Rules of Professional Conduct.”
Every law student is familiar with the incident related by Samuel Williston in his autobiography describing a civil case where he was counsel for defendant. Williston had in his possession the file of his client's correspondence with the plaintiff. Although plaintiff's lawyer had filed a number of interrogatories, he had asked no questions regarding certain letters and no proof of them was made at the trial. Williston's description of the situation has occasioned much classroom debate. He wrote: "In the course of his remarks the Chief Justice stated as one reason for his decision a supposed fact which I knew to be unfounded. I had in front of me a letter that showed his error. Though I have no doubt of the propriety of my behavior in keeping silent, I was somewhat uncomfortable at the time."

Non-lawyers to whom this case has been put have also been uncomfortable. They have been critical of a rule which tells the lawyers not to speak up under such circumstances especially in light of the oft-repeated boast that the adversary system is the best method of arriving at truth.

The Code of Professional Responsibility does require a lawyer to disclose "legal authority in the controlling jurisdiction known to him to be directly adverse to the position of his client and which is not disclosed by opposing counsel." The new Rule would require disclosure if the legal authority "would probably have a substantial effect on the determination of a material issue." These are significant in-roads on the absolutist approach to the adversary theory, yet there is little criticism today of the requirement.

Early in the discussions of the ABA Commission, Judge Marvin Frankel, one of its members, urged consideration of a rule that would require disclosure by a lawyer in a civil action of a fact known to the lawyer, even if the fact is adverse, when disclosure would probably have a substantial effect on the determination of a material issue. Judge Frankel had earlier advanced the same proposal in the 1974 Benjamin N. Cardozo Lecture, delivered before the Association of the Bar of the City of New York.
The Commission wrestled with the proposal at several of its sessions, and was sharply divided as to whether the time had come to make a change this basic in the adversary system. It was argued that the public image of the legal profession as one where courtroom deception is condoned, if not encouraged, would be substantially improved by a requirement of relevant factual disclosure. Comparison was made between the requirement of the disclosure of relevant law, which the judge is in a good position to ascertain, and the lack of any duty to disclose facts, which the judge is under considerable handicap in discovering.

The decision of the Commission not to require disclosure of material facts which the opponent fails to present was premised primarily on the adversary thesis that proof of the opponent's case should be left to him and that further opening of the files of an attorney to his less informed opponent should not be required. The rationale of Hickman v. Taylor, where the U. S. Supreme Court protected the work product of counsel from discovery by opposing counsel, may be apposite. The new Rules permit, but do not compel, disclosure of facts supportive of the opponent's position in civil actions.

The Frankel proposal is likely to be revived in the future and there is much to recommend its adoption as a means of assuring society that lawyers are seeking truth. Application of the proposal to criminal cases is unlikely in view of the commitment the Constitution makes to the privilege against self incrimination, coupled with the attorney-client privilege, and the special duty upon the prosecution to establish criminal guilt. These principles negate any duty upon the defendant or counsel to come forward with adverse evidence in a criminal action but do not discount the duty, previously addressed, not to commit or suborn perjury if the defendant does take the stand.

Conclusion

Although many additional public responsibilities of the lawyer necessitate in-roads on the strict adversary theory, efforts to ar-

51. RULE 3.1(e).
52. The preamble to the Rules begins: "The lawyer is an officer of the legal
rive at truth and at least to approximate truth when controversies develop should be central to a system of justice in our society. Arguments to the contrary fall upon deaf ears so far as the general public is concerned. For too long, deception has been rationalized as a necessary adjunct to the adversary system. If the legal profession and its members are looked upon as dissemblers, distorters who subordinate truth to winning, and as technicians who answer to but one command, that of their client, public confidence in lawyers will be found wanting. No assurances that lawyers do maintain confidences can compensate for loss of reputation as truth tellers. The duty to tell the truth and to assist otherwise in its ascertainment should be a bedrock principle in the adversary system. The legal profession owes no less to itself and society.